

**The State of Collective Bargaining in
South Africa: An Empirical and Conceptual
Study of Collective Bargaining**

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School of Economics

University of Cape Town

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Introduction

Collective Bargaining in South Africa has been primarily conducted through the mechanism of industrial and bargaining council. Statutory Councils, created by the new Labour Relations Act, also provide an avenue for collective bargaining. Outside the statutory system, bargaining occurs at enterprise and plant levels, and in non-statutory centralised bargaining forums.

This policy brief will present the findings of a study¹ that explored the current state of collective bargaining, the nature of existing bargaining structures, alternative models that are being developed, and how labour policy and regulation can better support collective bargaining and various types of bargaining structures.

The New legislative framework

According to the new LRA, there is no duty to bargain. Instead, the Act establishes a number of organisational rights, which now underpin collective bargaining. Under the Act, bargaining councils are the main avenue for collective bargaining. Participation by employers and employees on such bargaining councils is encouraged by a number of means, in particular the ability to have the agreement extended to all employers and employees in its jurisdiction if the parties are 'representative', with the Minister retaining a discretion to extend the agreement if the parties are only 'sufficiently representative'.

In line with the goal of more centralised collective bargaining, the LRA also developed the mechanism of statutory councils, which may be triggered on application by either a 'representative' trade union or employers

1 The research study was divided into four components. Sub-project one examined the state of the bargaining council system. Sub-project two examined the state of collective bargaining in three sectors in which non-statutory centralised bargaining forums exist as well as two sectors in which bargaining is conducted at enterprise level. Sub-project three looked at the situation of small businesses. Sub-project four examined how collective bargaining could be improved in the future through policy interventions, statute amendments, and explorations of alternative models and practices by the parties.

organisation.² The intention of the legislature was that these councils would provide a stepping stone to bargaining councils.

The LRA also enables the establishment of workplace forums with the aim of reducing adversarialism and promoting joint problem-solving at the workplace level.

However, not all aspects of the new scheme for collective bargaining have worked in facilitating and improving collective bargaining. Below this brief will explore the current collective bargaining landscape and the problems faced.

The Current Collective Bargaining Landscape – The statutory system

Bargaining Councils

The bargaining council system today exists as the main mechanism for collective bargaining in South Africa. However the system struggles create a presence or to survive in those sectors in which there is little history of trade union activity or collective bargaining, and those sectors experiencing increasing informalisation.

The number of bargaining councils has decreased in recent years due to the amalgamation of smaller councils into bigger councils and the fact that some councils have ceased to function or have been deregistered. Serious challenges are clearly faced by bargaining councils.

1. A major challenge is the issue of representivity and the requirements imposed by the LRA for the extension of agreements. Evidence suggests that representivity of parties to councils has been falling. A factor contributing to this is the increasing informalisation of the workforce. If low numbers of employees and employers join trade unions and employers' organisations which are parties to

² For statutory councils the threshold for representivity is 30 percent.

a council, it will be difficult for councils to meet the requirements for representivity set by the LRA to have an agreement extended to non-parties. If an agreement is not extended, employers who are bound to the agreement by their membership of the party employers' organisation may very likely be undercut by non-party competitors. Consequently, many employers will simply leave their employers organisation to discontinue their obligations in terms of the agreement. Ultimately, this may lead to the collapse of the council.

2. At present, the representivity requirement is rigidly interpreted. The Minister must extend an agreement of, the majority of all employees covered are members of the party trade union/s and the majority employees are employed by members of the party employer organisations. While the Department of Labour also has a discretion to extend an agreement if the bargaining council is sufficiently representative, evidence suggests that the Minister places strict requirements on a council for it to qualify as such.
3. There is clearly a great need for the Department of Labour to deal with the problem of the informal economy, and to develop a strategy to assist councils in centralised bargaining.³
4. In interviews with officials of various bargaining councils⁴, it was established that there was a demand for greater flexibility in their agreements. Many councils had already introduced some form of variation in their agreements.⁵
5. There has been an increasing centralisation of collective bargaining, with many agreements prohibiting plant-level bargaining over issues dealt with in the collective agreement. At the same time, plant-level bargaining within the jurisdiction of councils has appear to have decreased greatly. This implies that

3 The Department is considering certain options to deal with the representivity problem. One such option is to exclude atypical workers from the definition of 'representivity', given the difficulty in organising them. To encourage centralised bargaining, the Department has also considered using the threat of sectoral determinations to pressure employers into forming councils.

4 Metal and engineering, road freight, motor and leather industries.

5 For example: The Leather Bargaining Council has variation along sub-sectoral lines, i.e. Tanning, General Goods, and Footwear. All footwear firms are categorised as either formal, semi-formal and informal according to certain requirements, with different wage levels being applied to the first two categories, while the third category is totally excluded from the agreement.

little or no productivity bargaining is taking place.

6. Most bargaining councils are a credited with the CCMA to carry out dispute resolution functions. A complaint of all the councils interviewed was that the subsidy provided by the CCMA was insufficient to cover the costs involved in carrying out the dispute resolution function and that this ultimately put a great strain on their resources.
7. While it was the original intention of the LRA for the bargaining councils to develop and promote training, the effect of the promulgation of the Skills Development Act is to separate training from the councils. And while the SDA provides for bargaining council officials to be invited onto SETA boards, council officials report that not one of them have received such invitations.⁶

Statutory Councils

The provision for statutory councils has been unsuccessful in the LRA's goal of promoting centralised bargaining, this demonstrated by the fact that only two statutory councils⁷ have been thus far set up and registered. The main problem faced is the lack of mechanisms available to compel a party to participate in the council when it is unwilling to do so. Despite the above, the Department of Labour has not reviewed the statutory council model.

Workplace Forums

Workplace forums as they are currently envisaged in terms of the LRA have not been successful in the LRA's aim of reducing adversarialism and promoting joint problem-solving at the workplace level. It is clear that policy decisions must be made as how to best conduct bargaining at the plant and firm-levels in the light of the decrease in bargaining at this level.

6 It must be noted however that parties on councils were generally reprinted on SETA's.

7 Statutory Council for the Printing, Newspaper and Packaging Industry of South Africa and the Amanzi Statutory Council.

Quasi-statutory Centralised Bargaining: Contract cleaning and security

Currently, there exist few bargaining councils in the service industry due to a history of little trade union activity in the sector. However, a form of centralised bargaining has emerged in the security and cleaning sectors, employers recognising the need for such centralised bargaining because of the potential of undercutting in the absence of such an agreement. Collective bargaining occurs in a forum constituted in terms of the draft constitution of a yet to be established bargaining council. Instead of the extension mechanism, once bargaining councils have formed agreements, the parties have requested the Minister to issue sectoral determinations to give effect to such agreements.

Small Firm Perceptions of Bargaining Councils and Other Labour Regulations

Twenty-five interviews were conducted at small businesses⁸ with the purpose of determining their perceptions of bargaining councils and other labour legislation. It was found that respondents, with the exception of those covered by bargaining councils, had poor knowledge of labour legislation and other labour regulations.

A criticism by respondents was the high costs of labour regulations. Small firms also complained of poor enforcement. While respondents were mostly in favour of bargaining councils, they believed that bargaining councils were not effectively monitoring firms to ensure that all firms were complying with the minimum standards set by council agreements.

They also favoured a more flexible form of regulation which would take into account the special needs of small firms. It should be noted, however, that legislation does contain mechanisms⁹ to facilitate such flexibility; however, such mechanisms are not being used by small firms, presumably due to lack of knowledge.

8 Defined as firms with less than 20 employees.

9 Such mechanisms include the exemption system, which permits applications for exemption from agreements reached. The new LRA also directly promoted flexibility by making it easier for small firms to participate on councils via employers' organisations.

The Current Collective Bargaining Landscape – The non-statutory system

The strength of collective bargaining in all sectors, whether in the form of bargaining councils or not, is largely determined by trade union strength, which has been decreasing. Trade union strength is in turn dependant on their being significant numbers of employees in standard employment working together in the same workplace. The automobile manufacturing industry is a sector in which multi-party non-statutory centralised bargaining has been a success, due to there being a strong union and only seven firms. Multi-party non-statutory_centralised bargaining structures also exist in the mining and pelagic fishing sectors

Automobile manufacturing industry

The automobile manufacturing industry has developed innovative collective bargaining arrangements, particularly with respect to productivity agreements. Centralised bargaining in the automobile industry takes place at the National Bargaining Forum (NBF) (which was formed in 1990).¹⁰ All employers in the sector are represented on the NBF and collective agreements bind the entire sector.

The NBF recognises the need for the sector to grow and be competitive and this is reflected in its collective bargaining arrangements. In 1995, the NBF reached its first 3-year agreement, specifically designed to improve efficiency and productivity, skills and quality of working life. One such term of the agreement allowed workers to receive payment for skills aquired, even though they would stay in the same job. Dual – level bargaining is prohibited, but the agreement does provide a framework for company-level productivity bargaining and other variations.

¹⁰ There are two parties to the NBF, NUMSA, which represents the majority of workers, and AMEO (Automobile Manufacturers Employers' Organisation), which comprises the seven OEMs (original equipment manufactureres).

Retail

In the retail sector, centralised multi-party bargaining is not a feature due to low levels of unionisation. Organisation is difficult because of the fragmentation of the industry and the increasing informalisation of the industry. The LRA's definition of workplace makes it very difficult to get organised and to get recognition in the sector. Bargaining occurs with individual firms at either the national company level, regional level or store level, and unorganised firms are bound only by the sectoral determination.

Policy Recommendations

It is submitted that the legislative framework should be reviewed given the significant changes in the labour market over the past decade. Two scenarios are envisioned.

1. The Department should focus on actively supporting and promoting bargaining councils through support programmes and by disseminating best practices, and co-ordinating systems and resources. The National Productivity Institute should also be strongly involved in promoting productivity bargaining at councils. Attention should also be focused on encouraging and facilitating collective bargaining amongst sectors with little history of trade union activity, and experiencing increasing informalisation and externalisation.

There is also a strong need for the Department to review its current position on the requirement of "representivity". From the council side – much can also be done. Participation on bargaining councils could be encouraged through offering benefits to employees and employers for joining party trade unions and employers' organisations. For example, prohibitions on firm bargaining over issues in the main agreements should not be extended, and benefits should also not be extended. Dispute resolution subsidies should be raised, and councils should not be obliged to provide dispute resolution for non-parties in those circumstances in which the council agreement is not extended.

2. The second scenario envisions more significant changes to the current collective bargaining framework.

It is proposed that the duty to bargain should be reintroduced, along with the removal of organisational rights from statute and the review of the definition of 'workplace'. The labour court should have the power to make an 'order' recommending the level at which bargaining should take place. At the same time, unions should have the authority to use power should an employer refuse to cooperate.

There should however be two exceptions to this general rule. Firstly, in order to encourage framework agreements and productivity bargaining, the LRA should impose a duty to bargain at a bargaining council where the council can show that it has a framework agreement in place that provides only for minimum conditions, and allows for the negotiation of variations at firm level.

Secondly, in those situations in which an employer falls within the jurisdiction of a statutory council, the Labour Court should have the power to order the employer to bargain in the council.

Any bargaining mechanism developed for the workplace level must be able to develop productivity agreements, help build workplace democracy and lower adversarialism. Firms with 50 or more employees should be obliged to form workplace forums. Their compulsory powers should however be limited by statute to information sharing, but coupled with the ability to expand their powers to consultation and joint decision making should they reach sufficient representativity. At firms with between 20 – 30 workers¹¹, the majority should have the power to create a workplace forum. Additionally, the National Skills Fund and the SETA should provide funds for the training of representatives.

Finally, the LRA, the Employment Equity Act and the SDA need to be thoroughly examined to identify and eradicate any barriers in the way of creating a link between grading systems, training, and productivity schemes in order to incentivise skills development and improved performance.

11 The workers should include the employees of the firm and all other workers as the firm, including workers supplied by contractors or labour brokers.